



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2004

Mr. Jonathan Kaplan
Assistant City Attorney
City of San Antonio
P. O. Box 839966
San Antonio, Texas 78283-3966

OR2004-6820

Dear Mr. Kaplan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207042.

The City of San Antonio (the "city") received a request for certain stereo coverage film diapositives or duplicate aerial film. Although the city defers to the interested third party who may have a proprietary interest in the requested information to raise arguments for withholding the information, you state that the requested information may be subject to third party confidentiality claims. Pursuant to section 552.305(d) of the Government Code, the city notified the interested third party, Markhurd, of the city's receipt of the request and of Markhurd's right to submit arguments to us as to why any portion of the requested information should not be released. *See* Gov't Code §552.305(d); *see also* Open Records Decision No.542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). We have considered Markhurd's arguments and have reviewed the submitted representative samples of the requested information.¹ We have also considered comments submitted by a

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

representative of the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Section 552.301(b) requires that a governmental body ask the attorney general for a decision as to whether requested information must be disclosed and state the exceptions to disclosure that apply to the requested information not later than the tenth business day after the date of receiving the written request for information. *See* Gov't Code § 552.301(b). In addition, section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, (1) written comments stating the reasons why the stated exceptions to disclosure apply that would allow the requested information to be withheld; (2) a copy of the written request for information; (3) a signed statement of or evidence sufficient to establish the date that the governmental body received the written request; and (4) a copy of the specific information requested or representative samples of it, labeled to indicate which exceptions to disclosure apply to which parts of the documents. *See id.* § 552.301(e). You indicate that the city received this request for information on May 6, 2004. Therefore, the city had until May 20, 2004 to request a decision from us with respect to the requested information and until May 27, 2004 to provide us with the items that are required to be submitted to us for review under section 552.301(e). However, the city did not request a decision from us with regard to the requested information and did not submit the items required to be submitted to us for review under section 552.301(e) until June 8, 2004. Accordingly, we conclude that the city failed to comply with the procedural requirements of section 552.301 in requesting this decision from us.

Because the city failed to comply with the procedural requirements of section 552.301 in requesting this decision from us, the requested information is now presumed public. *See id.* § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The city must demonstrate a compelling interest in order to overcome the presumption that the requested information is now public. Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Since the city claims that the submitted information may be subject to third party confidentiality claims, we will address Markhurd's arguments.

Markhurd argues that the submitted information is excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial or financial information for which it is demonstrated based on specific factual

evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(a)-(b). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990). However, the private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983).

Section 552.110(b) of the Government Code requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). After carefully reviewing Markhurd's arguments and the submitted information, we find that Markhurd has failed to adequately demonstrate that any portion of the submitted information qualifies as a trade secret under section 552.110(a) or information, the release of which would cause Markhurd substantial competitive harm for purposes of section 552.110(b). Accordingly, we conclude that the city may not withhold any portion of the submitted information under section 552.110 of the Government Code. Consequently, the city must release the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).


If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/jev

Ref: ID# 207042

Enc. Submitted Materials

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